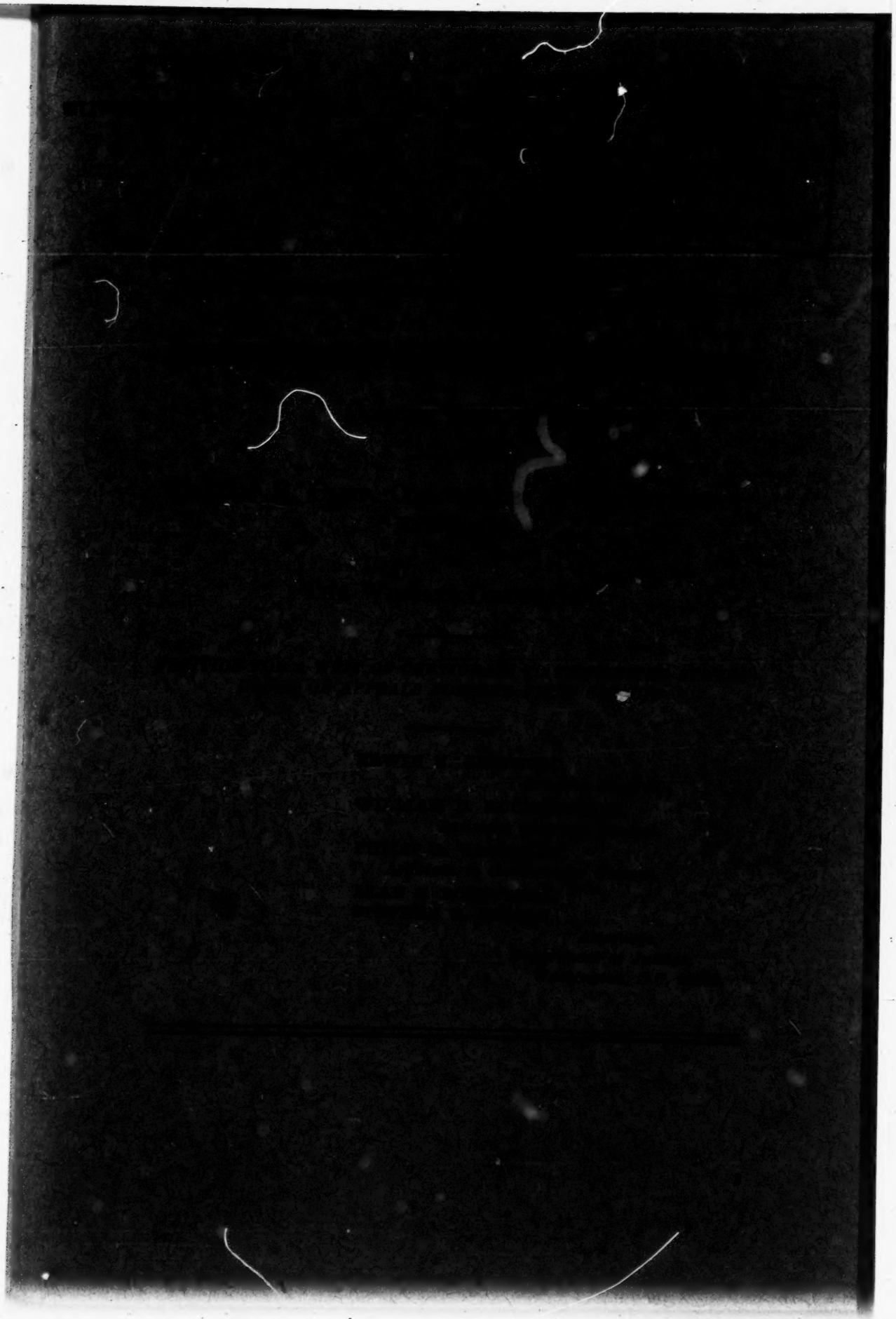

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. —

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

THE WINGATE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of William B. Camp, Comptroller of the Currency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 10–21)[1] is not yet reported. The opinion of the district court (App. C, pp. 23–37) is reported at 288 F. Supp. 49.

JURISDICTION

The judgment of the court of appeals (App. B, p. 22) was entered on March 27, 1969. The juris-

[1] References to "App." are to the appendices to this petition, *infra.*

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diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in applying the principle that standing to complain that a competitor's activities are prohibited exists only if the plaintiff is a member of a class intended to be protected by the statute allegedly violated, standing may be rested solely on a subsidiary policy behind a *different* statute plainly inapplicable to the defendant competitor.

STATUTES INVOLVED

The National Bank Act provides in pertinent part:

12 U.S.C. 24—

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; * * *.

Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. 1864, provides:

> No bank service corporation may engage in any activity other than the performance of bank services for banks.

STATEMENT

The Wingate Corporation, a company offering data processing services, brought this action for declaratory and injunctive relief against the Industrial National Bank of Rhode Island. The complaint alleged that the bank's furnishing of data processing services, and the ruling of the Comptroller of the Currency that such activities are permitted as incidental to the banking business,[2] were *ultra vires* under the grant of incidental powers to national banks in the National Bank Act, 12 U.S.C. 24 Seventh. The Comptroller and the City of Providence (which was about to contract for the bank's performance of certain data processing services) intervened as parties defendant.

The district court dismissed the action for lack of standing and Wingate appealed. The Court of Appeals for the First Circuit accepted the settled principle that Wingate would have standing to attack the lawfulness of a competitor's activities only if Wingate could show a legal right to be free of such competition or that the statute allegedly violated was intended to protect it or members of its class (App. A, pp. 12–14). The court also agreed that nothing in the legislative history of Section 24 Seventh evi-

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[2] Paragraph 3500 of the Comptroller's *Manual for National Banks* provides:

"Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

denced any congressional interest in protecting the competitive interests of businessmen engaged in activities that might be *ultra vires* for national banks (App. A, pp. 15–16).[3] The court went on, however, to hold that Congress had "indirectly" supplied a "sufficient statutory aid to standing" (App. A, p. 20) by passing the Bank Service Corporation Act of 1962, 12 U.S.C. 1861–1865, a century after enactment of the statute on which Wingate relied on the merits.

The 1962 Act upon which the court of appeals rested its grant of standing authorizes two or more banks to form a new "bank service corporation" to render, *inter alia,* data processing services, but directs that no such corporation "may engage in any activity other than the performance of bank services *for banks*". 12 U.S.C. 1864 (emphasis added). While no bank service corporation is involved in this lawsuit, the court below concluded that implicit in the act was "a broader purpose" than appeared from its focus and terms, so that "the passage" of the Act "arguably prohibits direct entry by [even individual] national banks into the data processing service business" (App. A, p. 21).

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[3] This position was determinative in that portion of the opinion relating to the case of *Arnold Tours, Inc. v. Camp*, which was briefed and argued separately from *Wingate* but which was decided in the same opinion. No statutory protection, direct or indirect, was found for the plaintiffs in *Arnold Tours*, who were travel agents attacking a ruling by the Comptroller allowing national banks to provide travel services. Consequently, the court affirmed the dismissal of their action for lack of standing. The travel agents have filed a petition for a writ of certiorari raising the question whether mere competitive injury, without more, is a sufficient basis for standing. *Arnold Tours, Inc.* v. *Camp*, No. 1407, O.T., 1968. The Comptroller is opposing that petition.

On the basis of this "arguable" result the court found that Wingate had standing to sue the Industrial National Bank and the Comptroller of the Currency to challenge their activities as unauthorized by the National Bank Act. In so holding, the court expressly noted (App. A, p. 20, n. 8) that the Court of Appeals for the Eighth Circuit had recently reached precisely the opposite result in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* No. 19218, decided February 6, 1969, petition for a writ of certiorari pending, No. 1246, O.T., 1968. The judgment dismissing the suit was therefore vacated and the case remanded for trial. This petition and a separate petition for a writ of certiorari filed by the national bank (*Industrial National Bank of Rhode Island* v. *Wingate Corp.,* No. 1408, O.T. 1968) have followed.

REASONS FOR GRANTING THE WRIT

The decision below is in explicit conflict with the recent decision of the Eighth Circuit on the identical question. Moreover, the question involved is important and recurring.

1. The First Circuit noted in its opinion (App. A, p. 20, n. 8) that its decision that the Bank Service Corporation Act provided a sufficient basis for standing conflicts with the decision of the Eighth Circuit in the *ADAPSO* case, *supra.*[4] That case involved an action by an association of data processing companies and a member of that association to invalidate

[4] The opinion of the Eighth Circuit in *ADAPSO* is included in the appendix to this petition (App. D, pp. 38–50).

the identical ruling of the Comptroller under attack here. The court there dismissed the plaintiffs' reliance upon the Bank Service Corporation Act as "misplaced" (App. D, p. 49, n. 12). A petition for a writ of certiorari is pending in that case (No. 1246, O.T., 1968), and because of the conflict between the circuits on this important legal question we are filing contemporaneously herewith a memorandum acquiescing in the granting of that petition.

2. The decision below is contrary to the standards established in this Court's prior decisions. As the Court said only last Term, standing has uniformly been denied—absent some other legal right—when "the statutory and constitutional requirements that the plaintiff sought to enforce [against a competitor] were in no way concerned with protecting against competitive injury." *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 6. Only "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, [does] the injured competitor * * * [have] standing to require compliance with that provision." *Ibid.* This same approach was reflected in *Flast* v. *Cohen*, 392 U.S. 83, where the Court emphasized that the fundamental aspect of standing is its focus on the plaintiff's *status*, which must have a definable nexus with the specific provision allegedly violated. See 392 U.S. at 102 and generally at 99–103. In that case the taxpayers were found to have standing to raise a claim that a particular spending program violated the First Amendment only because analysis of the history and pur-

pose of the First Amendment showed that one of its principal purposes was to forbid diversion of tax revenues to the aid of religion.

Both the court below and the Eighth Circuit agreed on the general principle that a statutory purpose of protection must be found. They further agreed that there was no such protective purpose in 12 U.S.C. 24 Seventh, the statute claimed to prohibit, or rather not to authorize, the provision of data processing services by national banks. But the court below parted company with the Eighth Circuit—and with the principles established by this Court—in finding "the sufficient statutory aid" in a separate and subsequent statute that was not even the basis for the plaintiff's claim on the merits. The court pointed only to the fact that the legislative history of the Bank Service Corporation Act included statements by several legislators indicating that one of the purposes—but by no means the principal purpose—of restricting the activities of *bank service corporations* was the protection of existing businesses.[5] Somehow, in the court's view, these remarks sustained the standing of the Wingate Corporation to challenge a *single national bank's* activities, authorized by the Comptroller, on the ground that

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[5] Indeed, even Senator Proxmire, who was primarily responsible for the explicit prohibition against a bank service corporation's furnishing services to non-banks, stated that the traditional legislative policy of confining banks to banking activities "has principally been * * * to assure the solvency of the banks by limiting the activities of banks to safe and relatively liquid investments." 108 Cong. Rec. 22031 (1962).

they exceed the powers granted a hundred years earlier in the National Bank Act. The Fifth Circuit similarly strained to find some legislatively protected interest supporting the plaintiff's standing in *Saxon* v. *Georgia Ass'n of Independent Insurance Agents,* 399 F. 2d 1010 (C.A. 5). Such rulings seem plainly inconsistent with this Court's insistence in *Hardin, supra,* that "the *particular* statutory provision invoked" must reflect an intent to protect the plaintiff's interests. 390 U.S. at 6 (emphasis added).

3. The implications of the issue on which the First and Eighth circuits have diverged are important. The logic of the decision below would give competitors of national banks standing to attack their authority to perform individually for non-bank customers any activity that they might have performed for themselves by the establishment of a bank service corporation, including all "clerical, bookkeeping, accounting, statistical, or similar functions" (12 U.S.C. 1861(b)). Indeed, since Section 4 of the Bank Service Corporation Act, 12 U.S.C. 1964, provides that "[n]o bank service corporation may engage in *any activity* other than the performance of bank services for banks" (emphasis added), the approach taken by the court below might even give standing to a competitor to attack any service by a national bank for a non-bank customer as not a proper "bank service." It would strain beyond reason the intent of a Congress preoccupied with other issues to say that the 1962 Act in fact granted such a sweep-

ing mandate for other businesses to use litigation under the National Bank Act as a weapon in their competition with the incidental services of the banks.

Even if the scope of the issue is limited to the standing of data processing companies to attack the activities of national banks, the question is still an important and recurring one, to which there should be a uniform answer. In 1967, 82 percent of banks with $50–100 million in assets offered computer services to customers. For banks with over $500 million in assets the figure was 98 percent. Banks in every state offer computer services; unless and until this Court acts, these activities will be subject to attack in the First Circuit and jurisdictions that may follow its approach, and immune to challenge in the Eighth Circuit and other circuits that may accept its position.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1969.

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APPENDIX A

United States Court of Appeals for the First Circuit

No. 7192.

ARNOLD TOURS, INC., ET AL., PLAINTIFFS, APPELLANTS,

v.

WILLIAM B. CAMP ET AL., DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

and

No. 7186.

THE WINGATE CORPORATION, PLAINTIFF, APPELLANT,

v.

INDUSTRIAL NATIONAL BANK ET AL., DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

Before Aldrich, Chief Judge, Woodbury,* Senior Circuit Judge, and Coffin, Circuit Judge.

March 27, 1969.

Aldrich, Chief Judge. These are two actions by parties engaged in certain business pursuits to restrain competition from national banks which, supported by rulings of the Comptroller of the Currency,

*Sitting by designation.

have entered their fields. Plaintiffs seek, basically, to attack these rulings. In both cases the district courts held that they were without standing to do so, and dismissed the complaints on motions of the defendants. Plaintiffs appeal.

THE TRAVEL AGENCY BUSINESS

We consider first the action brought by Arnold Tours, Inc. and some forty other independent travel agencies in Massachusetts, allegedly on behalf of others similarly situated as well as themselves, against the Comptroller and the South Shore National Bank. The bank, in reliance upon a ruling by defendant Comptroller's predecessor,[1] is engaging not merely in the financial aspects of travel, but "full" travel service, or a complete travel agency business. To quote from what is said to be the bank's own announcement, its employees are prepared to arrange for bicycles in Bermuda, villas on the Riviera, and houseboats in Kashmir. The Comptroller argues at length that this is traditional and legitimate bank activity. We do not, however, consider this matter except to say that plaintiffs present enough of an issue so that the question of standing is properly before us. We also note that no question of reviewability of the Comptroller's rulings has been raised. *See generally,* Saferstein, Non-

[1] ¶7475. National banks acting as travel agents.

"Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection, therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶7376."

reviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367, 383 & n. 60 (1968). Our sole question is the correctness of defendants' contention, which we will paraphrase as saying that what the bank chooses to do is, both literally and figuratively, none of plaintiffs' business.

It has long been settled that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business, in a suit against the competitor, the government, or both. *Railroad Co.* v. *Ellerman,* 1881, 105 U.S. 166; *Alabama Power Co.* v. *Ickes,* 1938, 302 U.S. 464; *Tennessee Power Co.* v. *TVA,* 1939, 306 U.S. 118. Despite numerous exceptions, this principle has withstood erosion not only because of the traditional rationale behind standing doctrines generally, *see Flast* v. *Cohen,* 1968, 392 U.S. 83, 91–101, but because of the policy encouraging free and open competition—a policy that favors competition in the market place, not in the courts. The exceptions, where standing is recognized, are as well established as the principle itself. The first is for complaints of "illegal" competition, by which is usually meant competition that is unlawful as to plaintiff apart from considerations of corporate power or authority. *See Alabama Power Co.* v. *Ickes, supra* at 479; *Central Louisiana Elec. Co.* v. *REA,* W.D.La., 1964, 236 F. Supp. 271, 277, *rev'd,* 5 Cir., 354 F. 2d 859, *cert. denied* 385 U.S. 815; *but cf. Kansas City Power & Light Co.* v. *McKay,* D.C.Cir., 1955, 225 F. 2d 924, *cert. denied* 350 U.S. 884. Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws. The second exception is where it is claimed that some "legal

right" has been injured, by which is meant, in its nonconclusory sense, that plaintiff has an independent property right, or a right to be free from the particular kind of competition he is challenging. Such a right is attached to or arises out of an exclusive franchise, on the one hand, or a restricted license or the like, on the other. *Frost* v. *Corporation Commission,* 1929, 278 U.S. 515; *cf. Whitney National Bank* v. *Bank of New Orleans,* D.C.Cir., 1963, 323 F. 2d 290, 299–300, *rev'd on other grounds,* 379 U.S. 411. Plaintiffs fit in no such category.

The final general exception is where the plaintiff can show the existence of a "statutory aid to standing" for a class of persons which includes himself. This statutory aid may take the form of a "judicial review" provision of the particular administrator in question for "parties aggrieved," "adversely affected," or the like. In such a case, *FCC* v. *Sanders Bros. Radio Station,* 1940, 309 U.S. 470, would presumably provide standing for legitimate competitors. *See generally, Jaffe, Judicial Control of Administrative Actions,* 513–31. There is, however, no such provision as to the Comptroller of the Currency. An alternative statutory aid may be found if there is an indication of Congressional intent, explicit or implicit, in the relevant substantive acts to grant protection to the competitive interests of a class of businesses which includes the plaintiff. Thus in *Hardin* v. *Kentucky Utilities Co.,* 1968, 390 U.S. 1, the Supreme Court found that a competing private utility company had standing to challenge the expansion of TVA into new areas in alleged violation of the area limitations of section 15d(a) of the Tennessee Valley Authority Act, 16 U.S.C. § 831n-4(a). The Court said, "[O]ne of the primary purposes of the area limitations in

§ 15d of the Act was to protect private utilities from TVA competition. . . . Since respondent is thus in the class which § 15d is designed to protect, it has standing. . . ." 390 U.S. at 6–7.

The only possible statutory aid to the standing of travel agents in national banking legislation exists in 12 U.S.C. § 24(7). This section states that national banks may "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking," and then lists numerous powers explicitly granted. It has long been settled in suits over private contracts that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking. *See First National Bank* v. *National Exchange Bank,* 1875, 92 U.S. 122, 128; *National Bank* v. *Matthews,* 1878, 98 U.S. 621, 625; *Logan County National Bank* v. *Townsend,* 1891, 139 U.S. 67, 73. But even assuming that national banks are prohibited by section 24(7) from entering into the business of procuring travel arrangements, this is not sufficient to provide a statutory aid to standing. The prohibition must be demonstrably intended to protect the competitive interests of other members of the prohibited business. *See* the concurring opinion of Judge Thornberry in *Saxon* v. *Georgia Ass'n. of Independent Ins. Agents,* 1968, 5 Cir., 399 F. 2d 1010, 1019; *Association of Data Processing Serv. Organizations* v. *Camp,* D.Minn., 1968, 279 F. Supp. 675, *aff'd,* 8 Cir. 2/6/69, F. 2d . We, too (see 8th Cir. opinion in *Camp,* n.10), cannot accept the simplistic suggestion by the majority in *Georgia Ass'n,* 399 F. 2d at 1016, that as soon as it appears that the competitive activities were unlawfully carried out the plaintiffs have standing.

The plaintiffs have not pointed to, nor have we in our research discovered, any evidence that Congress in delimiting the scope of banking activity in the ultra vires section, quoted *supra,* was concerned, in 1863 and 1864 when the national banks were formed,[2] with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents (if they then existed). Rather, the limitations were for the purpose of insuring the stability, liquidity, and safety of the banks. *See National Bank* v. *Matthews, supra* at 626; Davis, Banking Regulation Today: A Banker's View, 31 Law & Contemp. Problems 639 (1966). *See also* Million, The Debate of the National Bank Act of 1863, 2 J. of Pol. Econ. 251 (1894). No doubt Congress has continuously, from 1864 to the present, been "very careful" (see *infra*) in restricting the activities of banks; and no doubt Congress has been, as we shall see in the second portion of this opinion, specifically concerned with certain potential competitors of the banks. But as Senator Proxmire pointed out while offering an amendment to banking legislation[3] specifically designed to protect particular competitors, the thrust of the close regulation of banks is for purposes of stability: "We are very careful in the regulation of banks. This has principally been done to assure the solvency of the banks by limiting the activities of banks to safe and relatively liquid investments." 108 Cong. Rec. 22031 (1962). *See also* S.Rep. No. 2105, 87th Cong., 2d Sess. (1962) (Supple-

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[2] National Bank Act of 1863, ch. 58, 12 Stat. 665; National Bank Act of 1864, ch. 106, 13 Stat. 99.

[3] This legislation will form the basis of our holding in the second half of this opinion.

mental views of Senators Proxmire, Douglas, and Neuberger) in 2 U.S. Code Cong. & Admin. News, 1962, at 3887. While at some point Congressional concern with a sufficient quantity of specific competitors of banks might indicate a Congressional intent that section 24(7) should now be read as a measure not only to protect investors but also to protect all potential members of prohibited activities, such a point has not been reached. More proof of Congressional solicitude is required before this court or any court should convert an economic struggle into a legal one.

The plaintiffs have suggested however, that the general rule denying competitors standing is no longer valid, or has undergone substantial change. First, they argue that section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 provides standing for any persons claiming to be "adversely affected in fact." This contention seems derived from the interpretation of section 10(a) urged by Professor Davis in his Administrative Law Treatise, § 22.02, and presumably adopted in *American President Lines* v. *FMB*, D.D.C., 1953, 112 F. Supp. 346.[4] We, however, choose to side with Professor Jaffe[5] and the majority of the courts[6] in holding that the passage of the APA was not intended to alter to such a drastic extent previous law on the question of standing.

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[4] *See also Baker, Watts & Co.* v. *Saxon*, D.D.C., 1966, 261 F. Supp. 247.

[5] Jaffe, Judicial Control of Administrative Action 528–30. *See also* Note, Competitors' Standing To Challenge Administrative Action Under the APA, 104 U.Pa.L.Rev. 843 (1956).

[6] *See Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, *supra*, at 1019 n.1; *REA* v. *Northern States Power Co.*, 8 Cir., 1967, 373 F. 2d 686, 692–93 & nn. 9–10, cert. denied 387 U.S. 945; *Kansas City Power & Light Co.* v. *McKay*, *supra*.

Moreover, we should add that we have serious reservations whether a test of "adversely affected in fact" would provide a simpler means of deciding the issue of standing. We do not pause for such analysis in the present case, but if, as has been suggested, simplicity and ease of determination is a reason for preferring the new interpretation, we do not find it.[7]

The plaintiffs alternatively urge that *Flast* v. *Cohen, supra,* indicates a major shift in the judicial attitude toward the general doctrine of standing; and that while it is not directly in point, this decision indicates that the relevant test for determining standing in this situation is whether the parties are sufficiently adverse to bring into focus the issues raised. *See also* the concurrence of Judge Thornberry in *Saxon* v. *Georgia Ass'n of Independent Ins. Agents, supra.* Our first response to plaintiffs' contention is that *Flast* v. *Cohen* was not intended to have any major reshaping effect outside the area of standing determinations under Article III for taxpayer suits challenging the constitutionality of a federal taxing and spending statute. Such an approach to standing as used in *Flast*—one focusing solely upon an assessment of the degree of adversity and clarity of the particular case—if applied to questions of administrative law standing would disturb the entire judicial relationship to the administrative as presently understood by Congress. Congress now knows that if it

[7] Indeed, one of the bases for the rule against competitors' suits might well be the difficulty of determining whether mere increased competition is an injury in fact, particularly where a new and largely undeveloped market is involved. Cf. *World Airways, Inc.* v. *Northeast Airlines, Inc.*, 1 Cir., 1966, 358 F. 2d 691.

wishes a particular class of plaintiffs to have, or not to have, standing to seek review of agency rulings, it may make, or not make, the types of legislative provisions discussed earlier in this opinion, and that is an end to the matter. Under plaintiffs' proffered approach, the courts would have the last word on standing, based upon their view of the justiciability of the particular circumstances pleaded. When the conflict is one of constitutional dimensions, such an approach may be necessary. In purely administrative matters we think otherwise.

Our second answer is that even if we were to assume that *Flast* v. *Cohen* was intended to affect other areas, we do not read that case to require all administrative standing determinations to be made solely upon an assessment of the degree of adversity and clarity, Rather, *Flast* was concerned with reevaluating the standards for determining adversity and clarity in a situation where the relevant standing doctrine was adjudged to rest entirely upon such considerations. *Flast* is inapplicable when the standing doctrine in question rests upon a basis largely indepedent of the concerns for adversity and clarity—namely, the limited role of the judiciary in regulating legitimate competition.

In sum, we find no acceptable basis for standing for the travel agents.

DATA PROCESSING

Turning to the second action involving the Comptroller, here plaintiff, Wingate Corporation, which performs certain data processing services for hire, brings suit to enjoin the defendant, Industrial National Bank of Rhode Island, from performing data

processing services for the City of Providence, as sanctioned by a general ruling of the Comptroller. While Wingate, like Arnold, complains that the bank is violating section 24(7) of 12 U.S.C. by providing such services to bank customers, its claim to standing is aided by the presence of specific Congressional legislation dealing with banks and computer servicing. In 1962 Congress, after some debate, enacted the Bank Service Corporation Act, 76 Stat. 1132, which allowed small banks to combine to form a separate corporation which could own data processing equipment. The primary purpose of this legislation was to allow small banks to compete more effectively with the larger banks, which had sufficient capital and business to buy their own electric data processing equipment. However, in order to prevent such corporations being used as a subterfuge for entering into the nonbanking business of data processing, and to protect the interests of certified public accounting firms, Congress provided in section 4 of that Act, 12 U.S.C. § 1864, "No bank service corporation may engage in any activity other than the performance of bank services for banks." The legislative history is clear. The prohibition originated in an amendment proposed by the National Society of Public Accountants, which objected to the original version of the bill that would have allowed bank service corporations to solicit outside business to some extent. The Accountants feared injury to their growing business of bookkeeping with the aid of computers. The final provision was an obvious response. *See* 108 Cong. Rec. 16499, 22031 (1962); Hearings on Misc. Bank Bills Before the Comm. on Banking & Currency of the United States Senate, 87th Cong., 2d Sess., at 79–80 (1962).

We conclude that the present plaintiff is within the class of persons intended to be protected by section 4 of the 1962 legislation, and the only question is whether standing exists to complain not of competition from bank service corporations, but from national banks directly. We conclude in the affirmative. When Congress so explicitly provides protection for a particular business against competition from a regulated national entity—even though indirectly by regulating a subsidiary—standing exists at least to entertain complaints by that business concerning its competitive relationship to the national entity. Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears, expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S.Rep. No. 2105, *supra* (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.[8]

Indeed, there is a plausible argument that the Bank Service Corporation Act, read in conjunction with 12 U.S.C. § 24(7), does in fact impliedly prohibit national banks from directly entering into the data processing service business. If the section four prohibi-

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[8] *But cf. Association of Data Processing Serv. Organizations v. Camp*, 8 Cir., 1969, F.2d , n.12, which stated that the reliance of similar plaintiffs upon the Act for standing was "misplaced."

tion could be avoided by a small national bank, member of a group owning a service corporation, soliciting its own data processing customers to be serviced by the subsidiary via the bank, the prohibition would be largely illusory. And if a small bank could not directly solicit such customers, it would follow that the large banks, owning their own equipment, could not, or the equalizing effect of the Bank Service Corporation Act would be lost. To be considered in opposition to such an argument is the Comptroller's ruling interpreting the section,[9] and the phenomenon of the one-bank holding company, that is not covered by the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841–49, which requires only multi-bank holding companies to divest themselves of all nonbanking interests. We leave the resolution of this conflict to future determination. For the purposes of the issue of standing, we need decide only that the passage of the Bank Service Corporation Act arguably prohibits direct entry by national banks into the data processing service business.

In case No. 7192 the judgment of the District Court is affirmed.

In case No. 7186 the judgment of the District Court is vacated and the case remanded for further proceedings not inconsistent herewith.

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[9] Comptroller's Ruling ¶ 7399 provides in part that:

". . . such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking."

APPENDIX B

United States Court of Appeals for the First Circuit

No. 7186.

THE WINGATE CORPORATION, PLAINTIFF, APPELLANT,

v.

INDUSTRIAL NATIONAL BANK OF RHODE ISLAND, ET AL., DEFENDANTS, APPELLEES.

JUDGMENT

Entered March 27, 1969

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent with the opinon filed today.

By the Court:
(S) ROGER A. STINCHFIELD,
Clerk.

[cc. Messrs., Regno, Rosenthal and Goring.]

APPENDIX C.

District Court of the United States For the District of Rhode Island

Civil Action No. 3847

THE WINGATE CORPORATION, PLAINTIFF,

v.

INDUSTRIAL NATIONAL BANK ET AL., DEFENDANTS.

OPINION.

July 25, 1968

Day, Chief Judge. In this action the plaintiff seeks a declaratory judgment, injunctive relief and compensatory damages on the ground that the marketing of electronic data processing services by the defendant Industrial National Bank of Rhode Island is illegal, contrary to law and constitutes illegal competition with the plaintiff and others engaged in the business of furnishing such data processing services to the public at large.

This action was originally instituted against said Industrial National Bank of Rhode Island. Upon the filing of its complaint, the plaintiff sought an ex parte restraining order enjoining said defendant from executing a contemplated contract with the City of Providence, a municipal corporation, under the terms of which the defendant, its agents and servants would perform certain data processing services for said City of Providence. This relief was denied by me.

Subsequently William B. Camp, Comptroller of the Currency of the United States, and said City of Providence were granted leave to intervene as parties defendant. Thereafter plaintiff filed an amended complaint against said three defendants.

In said amended complaint plaintiff alleges that it, a corporation organized under the laws of the State of Rhode Island, and doing business as the Wingate Computing Center, is engaged in the business of marketing and performing data processing services for the general business community; that the defendant Industrial National Bank of Rhode Island is a national banking association organized and established under the National Bank Act with its principal place of business in the City of Providence, in the State of Rhode Island; that this action arises under the National Bank Act and involves an interpretation and application of said Act and a determination of the powers granted to national banking associations under the provisions of said Act as set forth in Title 12 U.S.C. § 24; that the defendant Comptroller of the Currency has by administrative ruling authorized the defendant Industrial National Bank of Rhode Island and other national banks to perform data processing services for the public at large; that said Comptroller of the Currency and said defendant bank may exercise only those powers granted to them, respectively, by said National Bank Act; that under the provisions of Title 12 U.S.C. § 24, paragraph Seventh, a national banking association has power:

> "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . ."

and that in no section of said National Bank Act is a national banking association authorized to engage in any other business activities which are not necessary to carry on the business of banking, and more specifically, that there is no provision in said Act authorizing a national banking association to engage in the business of offering and performing data processing services on equipment owned by it for the public at large.

Plaintiff further alleges that the ruling [1] by said Comptroller of the Currency authorizing national banking associations to engage in the marketing of data processing services is, therefore, "in violation of the National Bank Act, beyond statutory authority, arbitrary, capricious, an abuse of discretion and not in accordance with law"; that the defendant bank is engaged in the business of performing data processing services for the public at large not necessary to carry on the business of banking, which said activities are beyond the grant of powers to national banking associations and are unlawful and constitute illegal competition with the plaintiff and other persons similarly engaged in the business of furnishing data processing services for the public at large; that on October 2, 1967, said defendant bank entered into a contract with said City of Providence for the per-

[1] The present form of this ruling, set forth in Par. 3500 in Comptroller's Manual For National Banks (1966 Ed.) is:

"3500. *Utilization of data processing equipment*

Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

formance of such data processing services then being performed by its employees, and, further, that it is advised that the defendant bank did commence to perform such services on or about October 1, 1967; and that said activities of the defendant bank in performing and holding itself out as willing to perform data processing services for the City of Providence and the public at large are illegal, not a part of, incidental to or necessary to carrying on the business of banking, and are beyond the powers granted to national banks under said Act; that by performing said illegal data processing services and by holding itself out as willing and able to perform such services the defendant bank has caused, and unless restrained and enjoined, will cause substantial and irreparable harm to the plaintiff and to other persons engaged in the business of furnishing data processing services to the public at large by depriving them of customers for whom data processing services would be rendered and from whom compensation would be received, and that it has suffered injury and damage and is continuing to suffer injury and damage by the unlawful authorization of the defendant Comptroller of the Currency and said illegal activities of the defendant bank.

In its answer the defendant, Industrial National Bank of Rhode Island, admits that it has in the past and is presently offering incidental to its banking services to make available, and is performing data processing services for its customers and for other banks, but denies that it has offered in the past or presently is offering to perform data processing services for the public at large, not incidental to its banking services. It also admits that it has entered into a contract for the performance of certain data proc-

essing services for the City of Providence, one of its customers, and denies that the performance by it of such services for said City of Providence and other bank customers would be illegal or beyond its statutory powers.

The City of Providence in its answer admits the execution by it of said contract with said Industrial National Bank of Rhode Island for the performance by it of the data processing services described therein, and likewise denies that the performance thereof by the latter would be illegal or beyond its statutory powers.

This matter is now before me upon the motion of each of the defendants to dismiss this action upon the grounds that the plaintiff lacks standing to maintain this action and that this Court lacks jurisdiction over the subject matter thereof.

Plaintiff contends that it has standing to challenge the validity of said ruling by the Comptroller of the Currency under the provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, which provides as follows:

> "Rights of Review.
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof."

In construing a substantially similar provision in the Administrative Procedure Act, prior to its amendment in 1966, the Court of Appeals for the District of Columbia Circuit in Pennsylvania Railroad Company v. Dillon, 1964, 335 F. 2d 292, cert. denied sub nom American Hawaiian S.S. Co. v. Dillon, 1964, 379 U.S. 945, held at pages 294, 295:

". . . Under this statute appellants have standing to challenge agency action which they allege either causes them a 'legal wrong' or adversely affects or aggrieves them 'within the meaning of any relevant statute'.

"'Legal wrong', as we have only recently noted, is the invasion of a legally protected right. See Gonzalez v. Freeman, supra, 117 U.S. App. D.C. at — n.6, 334 F. 2d at 576 n.6. Thus, in order to make out a claim of 'legal wrong' under Administrative Procedure Act § 10(a), appellants must assert some legally protected right to be free of the competition provided by the two vessels whose documentation they are challenging. This court has very recently spoken on this aspect of standing. When 'Congress has not given them any such standing by express or implied provision of statute . . . mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing in the courts to sue to restrain such action. Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938); Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. denied, 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955).' Texas State AFL–CIO v. Kennedy, 117 U.S. App. D.C. 343, 345, 330 F. 2d 217, 219 (1964). For purposes of standing in this case, the sufficiency of appellants' allegations of 'legal wrong' thus depend upon congressional intent to bestow upon them a legal right to protection from such competition.

"Similarly, appellants' allegations that they are 'adversely affected or aggrieved . . . within the meaning of any relevant statute' depend for their adequacy as to standing upon the congressional purpose underlying the relevant sections

of the Merchant Marine Act of 1920, as amended. . . ."

To the same effect see: Rural Electrification Administration v. Northern States Power Company, 1967, 8 Cir., 373 F. 2d 686; Rural Electrification Administration v. Central Louisiana Electric Company, 1966, 5 Cir., 354 F. 2d 859; Braude v. Wirtz, 1965, 9 Cir., 350 F. 2d 702; Troutman v. Shriver, 1967, D.C. Fla., 273 F. Supp. 415.

In the recent case of Hardin v. Kentucky Utilities Co., 1968, 390 U.S. 1, the Supreme Court in passing upon the standing of Kentucky Utilities Company to maintain said action, said at page 5:

> "Before discussing the merits, we shall briefly consider petitioners' contention that the Kentucky Utilities Company lacks standing to challenge the legality of TVA's activities. We agree with both the courts below that this contention is without merit. This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. Railroad Co. v. Ellerman, 105 U.S. 166 (1882); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule at least since the Chicago Junction Case, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose

to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See Alton R. Co. v. United States, 315 U.S. 15, 19 (1942); Chicago v. Atchison, T. & S.F. R. Co., 357 U.S. 77, 83 (1958).

"Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition. . . . Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit, see Stark v. Wickard, 321 U.S. 288, 309 (1944); cf. United States v. I.C.C., 337 U.S. 426, 433–434 (1949), and no explicit statutory provision is necessary to confer standing."

In my opinion the cases relied upon by the plaintiff to support its claim of standing to maintain this action and to entitle it to the relief it seeks herein are clearly distinguishable from the instant case.

In National Bank of Detroit v. Wayne Oakland Bank, 1958, 6 Cir., 252 F. 2d 537, the plaintiff state bank was held to have standing to maintain an action to enjoin the establishment of a branch bank by the defendant, National Bank of Detroit, on the ground that it was protected against the competition of such a proposed branch bank by the provisions of 12 U.S.C. § 36(c) which incorporated by reference the statute law of the State of Michigan and under the circumstances existing the establishment of the proposed branch was prohibited by the statute law of Michigan. In holding that the plaintiff had standing to maintain its suit, the Court of Appeals held at page 544:

"As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights and injury from

> a competition which was prohibited by the federal statutes subjecting national banks to the same rules of law as cover state banks. . . ."

Suburban Trust Company v. National Bank of Westfield, 1962, D.C. N.J., 211 F. Supp. 694, is likewise a branch bank case. The plaintiff was held to have standing to maintain a suit to enjoin competition by a branch bank of the defendant national banking association under the provisions of 12 U.S.C. § 36(c). Title 12 U.S.C. § 36(c) permits a national banking association, with the approval of the Comptroller of the Currency, to establish and operate new branches—"(2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." Suburban sought to enjoin the establishment and operation of said branch bank in a location in which state banks by New Jersey law (N.J. S.A. 17:9A–18) were prohibited from establishing and maintaining branches. The courts held that plaintiff had standing to sue by virtue of the provisions of 12 U.S.C. § 36(c).

Commercial State Bank of Roseville et al. v. Gidney, 1959, D.C. D.C., 174 F. Supp. 770, aff'd 278 F. 2d 871, is likewise a branch bank case. The plaintiffs, Michigan state banks, sought a preliminary injunction to restrain the Comptroller of the Currency from issuing a certificate authorizing a national bank to open a branch office in Michigan. The court found that branch banking (banking operations at other than the principal office) by national banks is regu-

lated by state law under the provisions of 12 U.S.C. § 36(c), and that the plaintiffs had standing to sue as they sought to enjoin unlawful competition, i.e., competition prohibited by the statutes of the State of Michigan and enacted for their protection.

Similarly, Whitney National Bank v. Bank of New Orleans and Trust Company, 1963, D.C. Cir., 323 F. 2d 290, is a branch bank case. The Court of Appeals held that the plaintiff state bank had standing to sue to enjoin the establishment of a branch bank by Whitney National Bank which was prohibited under the provisions of 12 U.S.C. § 36(c).

In Webster Groves Trust Company v. Saxon, 1966, 8 Cir., 370 F. 2d 381, also relied upon by the plaintiff, the Court of Appeals held that competing banks as interested parties had standing to object to illegal competition but concluded that the Competroller of the Currency was under no duty to hold a formal hearing on an application for a charter for a new national bank.

In Baker, Watts & Co. v. Saxon, 1966, D.C. D.C., 261 F. Supp. 247, the plaintiffs sought to enjoin the Comptroller of the Currency from authorizing national banks to underwrite and deal in certian securities. The gravemen of their complaint was that they would then be subjected to illegal competition to their detriment. In holding that the plaintiffs had standing to maintain said suit, the court held that the Glass-Steagall Act, 12 U.S.C. § 378, prohibited such activities by national banks.

In Georgia Association of Independent Insurance Agents, Inc. v. Saxon, 1966, D.C. Ga., 260 F. Supp. 802, the plaintiffs were independent insurance agents and organizations which represented the collective interests of independent insurance agents. They sought

a declaratory judgment and an injunction against allegedly illegal acts by the defendant Comptroller of the Currency. In that case the defendant had authorized national banks in places with a population which exceeded five thousand inhabitants to act as insurance agents in writing insurance which was incidental to banking transactions, although Section 92 of Title 12 of the United States Code permitted national banks to act as insurance agents in places whose population did not exceed five thousand inhabitants. Plaintiffs alleged that the defendant was without authority to make said ruling which was in violation of Title 12 U.S.C. § 92, and that as the result of said ruling, national banks were able to compete illegally with the plaintiffs.

In denying the defendant's motion to dismiss for want of standing, the Court held at page 803:

> "In Tennessee Power Company, supra, and in Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1937), the plaintiffs alleged that they were suffering economic loss from government-created competition. In both cases the Supreme Court held that such economic loss alone did not confer standing on the aspiring plaintiffs. It is important to note that such competition was authorized by Congress and was based upon statutory grounds.
>
> "In the instant case, the competition complained of is not explicitly authorized by statute, but rather is impliedly prohibited by the congressional grant of the power to act as insurance agent in cities of *5,000 or less* population. Title 12 U.S.C.A. § 92."

And, further, the Court at page 804 stated:

> "Thus, the Court is of the opinion that the defendant's attack on the plaintiffs' standing is

> without merit. Title 12 U.S.C.A. § 92 has the effect of protecting insurance agents from certain competition. Surely, the plaintiffs have the right to their day in court to show that protection afforded them by 12 U.S.C.A. § 92 had been violated."

Investment Company Institute et al. v. Camp, 1967, D.C. D.C., 274 F. Supp. 624, was a suit by an association which represented open-end investment companies, investment advisors and principal underwriters, and by some of its members for an injunction to restrain the Comptroller of the Currency from authorizing national banks to collectively invest funds tendered to them as managing agents solely for investment purposes. Plaintiffs alleged that such activities by national banks would constitute illegal competition to their detriment. In holding that the plaintiffs had standing to sue, the Court said at Page 636:

> ". . . The statutes under which the regulation in issue was promulgated, were enacted to establish a clear Congressional policy which sought to separate national commercial banking from the securities business. The primary intent of Congress was to segregate these functions and to allow separate entities to engage in these business areas. This clarity of purpose is garnered not only from the Congressional hearings reports of the Glass-Steagall Act, but also from the exactitude with which Congress has delineated the areas of common interest in this financial structure. This strong general policy against the invasion of either field of endeavor by either entity is sufficient to postulate an interest upon which standing to challenge the regulation may be premised, cf. American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 80 S. Ct. 1570, 4 L.Ed. 2d 1527 (1960).

> "Therefore, by implication, the plaintiffs here have a right to complain of the competition which is being condoned under the Regulation. This competition is illegal in the sense that Congress has indicated its policy of separating the two financial institutions and this Regulation allows in an indirect manner a joinder of these interests. The plaintiffs were the recipients by implication of Congressional protection."

In granting the plaintiffs' motion for summary judgment on the merits, the Court held at Page 648:

> "In view of the statements and conclusions made above, this court holds that the provisions of Regulation 9 which allow commingling of managing agency accounts do not comply with the statutory provision of the Glass-Steagall Act are, therefore, illegal. The promulgation of these specific provisions allowing a commingling of managing agency accounts is also beyond the power of the Comptroller under Section 92a(a) of Title 12, and it is ordered to be set aside."

In support of its claim that the performance by the defendant bank of data processing services on its equipment for bank customers constitutes illegal competition with it and others who are similarly engaged in performing such services for the public at large, the plaintiff relies upon the provisions of 12 U.S.C. § 24 (par. Seventh), the provisions of the Bank Service Corporations Act, 12 U.S.C. §§ 1861–1865, and the congressional purpose that may be obtained from the legislative history of that Act.

12 U.S.C. § 24 (par. Seventh) provides that a national bank shall have the powers:

> "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . ."

Said Bank Service Corporations Act authorizes two or more banks subject to Federal supervision to invest limited funds in a bank service corporation for the purpose of providing bank services only for banks. Said Act defines bank services as:

> "services such as check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and making of checks, statements, notices, and similar items of any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a bank."

In my opinion the plaintiff has failed to establish that the provisions of paragraph Seventh of 12 U.S.C. § 24, which appeared in identical form in the National Bank Act of 1864, reflect a congressional purpose to protect the plaintiff from the competition which it seeks to enjoin in this action.

Similarly, I find that there has been no showing by the plaintiff that said Bank Service Corporations Act reflects a congresional purpose to protect the plaintiff and others engaged in performing data processing services for the public from the competition arising from the performance by national banks on their equipment of data processing services for other banks and their bank customers as a part of the business of banking and incidental thereto. Since said Act is by its express terms limited to Bank Service Corporations and their activities, it cannot be properly construced to apply to the activities of national banks generally.

Finding, as I do, that neither paragraph Seventh of 12 U.S.C. § 24 nor said Bank Service Corporations Act reflects a legislative purpose to protect the plaintiff against the competition of which it complains, it follows that the plaintiff lacks standing to maintain this action and this Court lacks jurisdiction over the subject matter thereof.

The defendants' motions to dismiss are granted.

Chief Judge.

APPENDIX D

United States Court of Appeals for the Eighth Circuit

No. 19,218

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., AND DATA SYSTEMS, INC., APPELLANTS,

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, AND AMERICAN NATIONAL BANK AND TRUST COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[February 6, 1969.]

Before Vogel, Lay and Bright, Circuit Judges.

Lay, Circuit Judge.

Plaintiffs appeal from an order dismissing their complaint against the Comptroller of the Currency of the United States and the Minnesota domiciled American National Bank and Trust Company. One of the plaintiffs is Association of Data Processing Service Organizations, an incorporated association of data service organizations domiciled in Pennsylvania whose members perform data processing services throughout the United States. It is hereinafter referred to as ADAPSO. The other plaintiff, Data Systems, Inc., is a Minnesota corporation engaged in the data processing business, with its principal place of business

in Minneapolis. The complaint seeks equitable relief against the defendants and a "determination of the powers granted national banking associations under [the National Banking] Act as set forth in 12 U.S. Code § 24." It is alleged that by administrative rule the Comptroller of the Currency has authorized national banks to perform data processing services for bank customers in violation of 12 U.S.C. § 24 which gives national banks only "incidental powers as shall be necessary to carry on the business of banking." Plaintiffs allege that as a result of the unauthorized action ADAPSO members are threatened with the loss of a substantial part of the data processing market.[1] It is alleged that American National now performs data processing services for two companies with whom Data Systems had "negotiated" as prospective customers.

Jurisdiction is asserted by reason of an alleged federal question arising under the banking laws of the United States. 12 U.S.C. §§ 21 et seq. The trial court dismissed plaintiffs' complaint for lack of jurisdictional standing. We affirm.

The question of standing serves as a test of federal jurisdiction. Standing is the constitutional prerequisite related to whether a justiciable "case or controversy" exists. Involved is an examination to determine whether the plaintiffs have a personal stake legally sufficient "to assure that concrete adverseness" which avoids merely abstract determinations. *Flast* v. *Cohen*, 392 U.S. 83 (1968). See also *Aetna Life Ins.*

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[1] We need not decide whether ADAPSO as an association can property allege "loss of competition" on behalf of its members when it is not engaged in the data processing business itself. See discussion Jaffe, Judicial Control of Administrative Action 542–43 (1965).

Co. v. *Haworth,* 300 U.S. 227 (1937). Justiciability, although not always related to standing, becomes definitively attached when we consider whether the legal relationships of parties are such that they are aligned with adverse legal interests.

Plaintiffs assert standing in that they have been and will continue to be economically injured by *illegal* competition of the national banks. Whether a litigant has standing to challenge competitive injury has been the subject of extended litigation and discussion. Doctrinal rules have developed a maze of conceptualistic abstractions and theories which at times are viewed and applied as being indistinguishable one from another. See *Baker, Watts & Co.* v. *Saxon,* 261 F.Supp. 247 (D.D.C. 1966), aff'd sub nom., *Port of N.Y. Authority* v. *Baker, Watts & Co.,* 392 F. 2d 497 (D.C. Cir. 1968); *Saxon* v. *Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F.2d 1010, 1019 (5 Cir. 1968) (concurring opinion).[2]

The trial court here has observed that language in *Rural Elec. Admin.* v. *Northern States Power Co.,* 373 F. 2d 686 (8 Cir. 1967) (denying standing)[3] and in *Webster Groves Trust Co.* v. *Saxon,* 370 F. 2d 381 (8 Cir. 1966) (allowing standing)[4] seems to state diverg-

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[2] See also extended discussion in 3 Davis, Administrative Law 208–294 (1958); Jaffe, Judicial Control of Administrative Action 500–531 (1965). And more recently Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968).

[3] We stated in *Northern States,* 373 F. 2d 692:

"Appellees readily recognize that the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans."

[4] We stated in *Webster Groves,* 370 F. 2d 388:

"[W]hen a competitor believes he is being subjected to illegal competition owing to impropriety by the Comptroller, the courts should be open to hear and decide the alleged wrong."

ent principles either of which could govern in the instant case. However, all legal principles must be qualitatively analyzed within the context of factual surroundings. Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or upon the possible merits of the substantive claim rather than upon an examination of the *status* of the complaining plaintiff. Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself determine a plaintiff's standing to complain. Cf. *Chicago* v. *Atchison, T. & S. F. Ry.,* 357 U.S. 77 (1958) and note 8 infra. Chief Justice Warren has stated, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." However, he added, " * * * it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. 83, 99, 102 (1968).

Whether a party may or may not challenge allegedly illegal competition by others is best evaluated by examining the various factual circumstances within which the courts have discussed a particular plaintiff's standing and competitive injury.

Perhaps most well known are the so-called "power cases," where the threatened economic loss arises from government-created competition. In these situations the embryo of the competition by the defendant is generally found in congressional legislation. But even though the validity of such legislation is challenged, or an attack is made on the authority of a government agent to loan money, the courts uniformly have

denied standing to competitors who otherwise possess no legal right to be free from competition.[5] This group of cases is represented by *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 137 (1939), which early emphasized:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

See also *Rural Elec. Admin.* v. *Northern States Power Co.*, supra.

Secondly, in contrast to the "power" cases are situations where a plaintiff, possessing a public grant or contract to operate, seeks to prevent a competitor from entering into an area of regulated and *restricted* competition. Representative of these cases is *Frost* v. *Corporation Comm'n*, 278 U.S. 515 (1929). This court has applied the rationale of *Frost* to a suit by a state bank against the Comptroller to prevent illegal competition. *Webster Groves Trust Co.* v. *Saxon*, 370 F. 2d 381 (8 Cir. 1966). As observed in *Whitney Nat'l*

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[5] In addition, even though the attack upon a government program to loan money is alleged to be illegal, this does not make the competition itself legally wrong. This is explained because "the borrower owes him [the plaintiff] *no obligation* to refrain from using the proceeds in any lawful way the borrower may choose." *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 480 (1938). (Emphasis ours.)

Bank v. *Bank of New Orleans & Trust Co.*, 323 F. 2d 290 (D.C. Cir. 1963), rev'd on other grounds, 379 U.S. 411 (1965), involved is a property right arising out of a public charter which bestows a *legal* interest on a state bank to complain.[6]

Closely related but significantly different are those cases involving areas of competition which because of public interest find need of public licensing as opposed to a public grant or contract.[7] Here plaintiff-compet-

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[6] The branch banking provisions of the National Banking Act make the establishment of branch banks subject to the law of the states. 12 U.S.C. § 36. A primary purpose in doing so is to ensure competitive equality between state and national banks. *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It has accordingly been held that this provision gives state banks a sufficient legal interest to provide them with statutory standing to challenge the legality of branching by national banks. See *National Bank* v. *Wayne Oakland Bank*, 252 F. 2d 537 (6 Cir. 1958), discussed in *Hoosier State Bank* v. *Saxon*, 248 F. Supp. 233 (N.D.Ind. 1965). The contrast between basing a state bank's standing on a "property right" arising out of its charter and standing by reason of its inclusion within the class intended to be protected by the National Banking Act is one without essential difference. Perhaps the most realistic approach is that the right indigenous to the charter is protected by the statute.

[7] The Court stated in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 at 474 (1940):

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of rail-

itors are considered to be without a private "legal right" to protest unauthorized competition but nevertheless find standing by specific legislation as "aggrieved persons" to act in the public interest. See, e.g., *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942). Cf. *Office of Communication of United Church of Christ* v. *FCC*, 359 F. 2d 994 (D.C. Cir. 1966). In these cases *Congress* has patently recognized need for judicial review even though the competitive business controlled is considered free and otherwise unrestricted.[8]

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roads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

"An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.

"But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

[8] But cf. *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958). The Supreme Court recognized standing of a municipal licensed public transportation system to intervene and attack the entry of one seeking to compete in an alleged violation of a city ordinance. The Court made clear that standing of the intervenor could not be viewed from examination of the merits as to whether in fact the competition was or was not illegal. Parmelee, the intervenor, for many years had enjoyed

Fourth, there are situations where competitors are given standing to challenge competition which is allegedly in violation of a statute, where the statute itself is said to be enacted for the express protection of the class of competitor complaining. The most recent example of these cases is found in *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1 (1968).[9] Plaintiffs' reliance on

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an arrangement with the railroad to transport passengers between stations. Parmelee was notified of its termination. A competitor, Railroad Transfer Service, was subsequently given this business notwithstanding a city ordinance that prohibited it from doing so without a license from the city. The Court found that Parmelee had "a direct and substantial personal interest in the outcome" and allowed standing. The ordinance was then held unconstitutional as being repugnant to the Interstate Commerce Act and the intervenor lost.

This case may best be categorized with those instances where standing to challenge illegal competition is implicity found within a legislative enactment, be it an existing ordinance or statute, valid or not. Cf. *Alton R.R.* v. *United States*, 315 U.S. 15, 19 (1942).

[9] The Supreme Court said:

"This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co.* v. *Ellerman*, 105 U.S. 166 (1882); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See

recent cases against the Comptroller fall within facile classification of this rule. See, e.g., *Baker, Watts & Co.* (D.D.C. 1967); *Saxon* v. *Georgia Ass'n of Ind. Ins. vestment Co. Institute* v. *Camp,* 274 F.Supp. 624, 636 (D.D.C. 1967); *Saxon* v. *Georgia Ass'n of Ind., Ins. Agents, Inc.,* 399 F. 2d 1010 (5 Cir. 1968).[10]

Fifth, the last group of "competition" cases relates to a plaintiff's unsuccessful challenge of a competitor's alleged *ultra vires* acts affecting plaintiff's non-regulated area of commerce. This factual setting is best illustrated by *Railroad Co.* v. *Ellerman,* 105 U.S. 166 (1882). In that case the plaintiff, who had contracted with the city of New Orleans to collect revenue from users of the city wharves, sought to enjoin a railroad company from operating wharves in New Orleans. He alleged this action would constitute illegal competition because the state statute authorizing the company to operate wharves was unconstitutional. The principle here furnishes an analogue to that in the "power cases" where the conduct of the

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Alton R. Co. v. *United States,* 315 U.S. 15, 19 (1942); *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U.S. 77, 83 (1958).

"Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition." *Hardin* v. *Kentucky Util. Co.,* 390 U.S. at 5–6.

[10] We do not share confidence in the alternative holding in *Saxon* v. *Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F. 2d 1010 (5 Cir. 1968), that outside the "statutory aid to standing" plaintiffs had "a legal right to protect themselves from unlawful competition." Id. at 1018. The emphasis that plaintiff's standing arises out of the allegation of "unlawful competition" as contrasted to "lawful competition" seemingly relates standing to the merits of the claim to be adjudicated rather than the status of a party to complain. For a similar critique, see JudgeThornberry's concurring opinion 399 F. 2d at 1020 n. 3.

defendant, although alleged to be illegal is nevertheless considered "lawful" with respect to the plaintiff because of the total absence of legal interest found in plaintiff's status.[11]

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[11] This is explained by Mr. Justice Matthews in *Railroad Co.* v. *Ellerman*, 105 U.S. at 173–174:

"The sole remaining question then, is, whether Ellerman, as assignee of the city, has any legal interest which entitled him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however, injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. *The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial

In summary, a plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, *Frost* v. *Corporation Comm'n, supra,* (2) a legal interest by reason of statutory protection, *Baker, Watts & Co.* v. *Saxon,* supra, or (3) a "public interest" in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public, *FCC* v. *Sanders Bros. Radio Station,* supra. From this analysis, it seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

In the instant case the facts clearly place plaintiffs outside those cases which recognize standing. Plaintiffs are competing in a non-regulatory field of free competition. They possess no private legal interest nor do they plead any legal harm which is recognized at law. Their status is not one which places them within a class designedly protected by statute.[12] In

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tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Emphasis ours.)

[12] The Banking Act has never been construed to give a private litigant standing to complain concerning *ultra vires*

direct accord see *Wingate Corp.* v. *Industrial Nat'l Bank,* 288 F.Supp. 49 (D.R.I. 1968); *Arnold Tours, Inc.* v. *Camp,* 286 F.Supp. 770 (D. Mass. 1968).

Plaintiffs' argument is in essence an equitable plea, that in effect they have a personal stake to pursue, even though not a legal one, but nevertheless one which makes them logical parties to protect the public interest from illegal actions of government agencies.

The problem with their plea is many-fold. Congress has not seen fit within the National Banking Act to recognize any "aggrieved person" to assert the public's rights. Congress has not expressed a public concern for protection as found in *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940), and its progenitors. Without a legal interest or the status of a recognized "aggrieved" party, the complaint resolves itself into an attempt merely to show "a common concern for obedience to law." *L. Singer & Sons* v. *Union Pac. R.R.,* 311 U.S. 295, 304 (1940). As pronounced in *Singer,* outside statutory consent, the general or common interest can find protection only in the standing granted to public authorities. Unless a relevant statute provides for a "party in interest" to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a

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acts of national banks relating to executed contracts. See *National Bank* v. *Matthews,* 98 U.S. 621 (1878). Although distinctive policy arguments exist for this rule, nevertheless there exists no legislative history nor do plaintiffs offer any serious contention that the National Bank Act was intended to give these private litigants standing to litigate alleged *ultra vires* activities of national banks. The reliance on the Bank Holding Company Act of 1966 and the Bank Service Corporation Act is misplaced. Neither act is applicable here.

"private attorney general" to represent the public interest. See *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (D.C. Cir. 1955); *Braude* v. *Wirtz*, 350 F. 2d 702, 707, 708 (9 Cir. 1965).[13]

Mr. Justice Frankfurter best describes judicial obligation to avoid review when legal standing is not otherwise involved:

> "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.' The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 150 (1951) (concurring opinion).

Judgment affirmed.

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[13] See also our prior discussions concerning the applicability of the Administrative Procedure Act in *Rural Elec. Admin.* v. *Northern States Power Co.*, 373 F. 2d at 692 n. 9.

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